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January 25, 1977

Mr. Arthur H. Fowler, Comptroller
Department of Administration and Control
State House Annex
Concord, NH 03301

Dear Mr. Fowler:

You have requested our opinion on two questions of law:

1. Must a Justice who retires from the Superior or Supreme Court discharge assignments as a Judicial Referee under RSA 493-A as a condition of receiving retirement benefits under RSA 490:2 (Supp 1975) and 491:2 (Supp 1975)?

2. Is a former Justice of either court entitled to retirement benefits under RSA 490:2, II (Supp 1975) or 491:2, II (Supp 1975) when he retired prior to the effective date of those particular provisions (i.e., April 2, 1974)?

We answer each of your questions in the negative. To understand the reasoning which we believe supports these conclusions it is necessary to consider RSA Chapter 493-A, providing for the Judicial Referee System; RSA 490:2, II (Supp 1975) and 491:2, II (Supp 1975), providing retirement benefits for Justices of the Supreme and Superior Courts, (both cited hereinafter as Section 2, II (Supp)); and Article 36 of Part I of the Constitution of New Hampshire, precluding the grant of pensions for more than one year at a time.

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Prior to the effective date of Section 2, II (Supp), April 2, 1974, a retired Justice of either the Supreme or Superior Courts might receive compensation in his position of retired Justice under one or the other of two groups of statutory provisions. First, if otherwise eligible, he might receive benefits like any other retired State officer or employee under RSA Chapter 100 or RSA Chapter 100-A (Supp 1975), each establishing a retirement system. Second, a Justice who retired after a certain minimum number of years of service became, as one would today, as a matter of law, a Judicial Referee under RSA 493-A:1 (Supp 1975). A Judicial Referee might be assigned certain duties under this provision, although no minimum level of assigned duties was, or is, necessary to entitle a Judicial Referee to compensation under RSA 493-A:2 (Supp 1975) of "three-fourths of the currently effective annual salary of the office from which he is retired." Such compensation is paid "for services which he may render as Judicial Referee" (emphasis supplied). (Receipt of such compensation was conditioned on termination of membership in the retirement system established under RSA 100, to avoid duplication of benefits, though no similar condition was provided, expressly at least, with respect to the system established under RSA 100-A (Supp 1975)).

In this context, we interpret the characterization of Section 2, II (Supp) judicial retirement benefits as "additional compensation for services rendered and to be rendered" as requiring some further services as a Justice on one of the courts, but not discharge of assignments as a Judicial Referee, as a condition of receiving those retirement benefits. First, as we have noted above, the provisions of RSA 493-A creating the position or status of Judicial Referee do not themselves require any actual service in the sense of discharge of particular assignments by a Judicial Referee as a condition of receiving compensation as a Referee. It would be odd, at least,

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to read Section 2, II (Supp) as imposing a more onerous condition on Judicial Referees in the absence of clearer language. Second, there is no indication in the legislative history of Section 2, II (Supp) that the phrase "and to be rendered" was intended to refer to services as a Judicial Referee. Third, a more obvious explanation flows from a consideration of Article 36 of Part I of the Constitution of New Hampshire, which precludes the grant of a pension for more than one year by any particular statutory provision. The payment of retirement benefits as a consideration for services rendered after the enactment of the legal provision for those benefits does not constitute payment of a "pension" within the meaning of Article 36. Compare Opinion of the Justices, 88 N.H. 511, 512 (1937) with Opinion of the Justices, 102 N.H. 75, 77 (1959). Hence, a ready explanation for the language "and to be rendered" is that it merely requires some actual services after the effective date of the act in order to avoid the restriction on pension payments. Service as a Justice after the effective date of Section 2, II (Supp) is sufficient for this purpose. We therefore conclude that discharge of assignments as a Judicial Referee is not necessary to qualify for benefits under Section 2, II (Supp).

Your second question relating to the possibility of benefits to one who retired as a Justice after the effective date of Section 2, II (Supp) raises essentially the question whether services solely as a Judicial Referee are sufficient to entitle the Judicial Referee to Section 2, II (Supp) benefits. In concluding that service as a Judicial Referee is not sufficient, we rely first on the text of Section 2, II (Supp) and the preceding section. Section 2, II (Supp) provides benefits to "any justice of the supreme [or superior] court who retires" with sufficient service. Section 1 of RSA 490 and 491 defines

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the respective Courts as consisting of a Chief Justice and a particular number of Associate Justices, together with such Justices as may be retired because of permanent disability. The definition thus excludes Justices who have retired voluntarily or because of age. Provision for basic benefits under Section 2, II (Supp) extends to a "Justice of the supreme [or superior] court," thereby apparently excluding those who were not members of the appropriate Courts on the effective date of the section.

As previously noted, a Justice who has retired either voluntarily or because of age becomes a Judicial Referee as a matter of law pursuant to RSA 493-A. That chapter also seems to indicate that the terms "justice" and "judicial referee" have distinct meanings. For example, RSA 493-A:2 (Supp 1975) allows payment of benefits in certain circumstances to "[a]ny judicial referee, and any justice retired under the provisions of RSA 490:2 or 491:2". In addition, RSA 493-A:1 (Supp 1975) provides that Judicial Referees "shall be subject to the same disqualifications with respect to the practice of law as are provided by RSA 492:1" for Justices of the Supreme and Superior Courts.

It is thus our opinion that a Judicial Referee who retired from his Court prior to April 2, 1974 may presently be eligible for retirement benefits only under RSA Chapter 100 or RSA Chapter 100-A (Supp 1975) or under the provisions for benefits to Judicial Referees under RSA 493-A. We note again, however, that compensation as a Judicial Referee is not conditioned upon the discharge of actual assignments under that chapter. In addition, the Social Security Administration has recently taken the position that Judicial Referees' compensation need not be reported and taxed for Social Security purposes except to the extent such compensation is attributable to the actual discharge of duties.

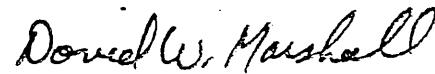
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We think it is also appropriate to state that we are surprised that the Legislature in 1974 did not extend retirement coverage under Section 2, II (Supp) to any who were then Judicial Referees so long as they discharged some actual assignments after the effective date of the 1974 enactments. In our opinion, by means of a simple amendment the benefits of that section could constitutionally be extended to Judicial Referees who retired after April 2, 1974 so long as such Referees would discharge some assignments after the effective date of such an amendment. Since we are familiar with the history and provisions of the statutes involved, we would be happy to draft such an amendment if asked to do so.

Yours sincerely,



David H. Souter
Attorney General



David W. Marshall
Attorney

DWM/mb